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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID MICHAEL SUMMERS,
Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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37pp

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether a motion to disqualify a federal judge under 18 U.S.C. §455(b) is self executing (timely) when the grounds tendered are undisputed that the judge is disqualified as a matter of law because he represented the opposing party (state), was tendered as a witness by the state (opposing party) in related state habeas proceedings, and had conversations with the main witness for the Petitioner which the opposing party tendered as relevant and material?

B. PARTIES INVOLVED

The parties are identified in the style of this case.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 15 August 1997, rehearing denied 08 October 1997.

D. CITATIONS TO OPINIONS BELOW

1. *Summers v. Singletary*, 119 F.3d 917 (11th Cir. 1997).

2. *Summers v. State*, 573 So.2d 843 (Fla. 1st DCA 1991).

3. *Summers v. State*, 463 So.2d 311 (Fla. 1st DCA), *review denied*, 475 So.2d 696 (Fla. 1985).

E. JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on 15 August 1997. (A -1). A timely filed Petition for Rehearing was denied by the Court of Appeals on 08 October 1997. (A-12-13). The jurisdiction of the Supreme Court of United States is invoked pursuant to 28 U.S.C. §1254.

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C.§455 which provides:

§455. Disqualification of justice, judge, or magistrate

(b) He shall also disqualify himself in the following circumstances:

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceedings a waiver of any ground for disqualification enumerated in subsection (b).

G. STATEMENT OF THE CASE

David Michael Summers, the Petitioner, was charged in state court, the First Judicial Circuit, Okaloosa County, Florida, in a four-count information with armed burglary [§§ 810.02(1), 810.02(2)(b) and 775.087(2), Fla. Stat.] Count I, kidnapping [§ 787.01, Fla. Stat.] Count II, sexual battery with a firearm [§ 794.011(3), Fla. Stat.] Count III, and aggravated assault [§§ 784.021(1)(a) and 775.087(2), Fla. Stat.] Count IV in 1982. (R1-1-2). On the advice of retained out-of-state counsel, Mr. Summers pleaded guilty to Count III, sexual battery with a firearm; a nolle prosequi was entered for counts I, II, and IV. (R1-1-2). On 22 April 1983, a judgment of conviction was entered against Mr. Summers by the state court judge. Mr. Summers was sentenced to two-hundred (200) years imprisonment; jurisdiction was retained by the state court for review of parole release for a period of 100 years, § 775.087(2), Fla. Stat. (R1-1-1).

Mr. Summers appealed the conviction to the District

Court of Appeal, First Appellate District of Florida. While the appeal was pending, Mr. Summers filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 and raised an ineffective assistance of counsel claim.[1] The district court of appeal temporarily relinquished jurisdiction, and an evidentiary hearing was held on 13 January 1984. The state trial judge denied the motion on the same day. The appeal of the denial of the 3.850 motion was consolidated with the direct appeal of the judgment and sentence to the First Appellate District Court of Florida. The District Court of Appeal affirmed the conviction and sentence on 19 December 1984. *Summers v. State*, 463 So.2d 311 (Fla. 1st DCA 1984). Mr. Summers then petitioned the Supreme Court of Florida for review, which denied review. 475 So.2d 696 (Fla. 1985). Mr. Summers then filed his first federal habeas corpus petition pursuant to 28 U.S.C. §2254 in

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[1] Mr. Summers was advised by counsel that the "capital" charge he was facing was punishable by death, and the proposed plea was in his best interest.

the United States District Court, Northern District of Florida, Pensacola Division, Case No. 86-4190-RV. The petition was filed on 30 April 1986. Mr. Summers alleged ineffective assistance of counsel. The district court denied the petition on 25 March 1987. The denial was appealed to the Eleventh Circuit Court of Appeals which affirmed the district court with an unpublished opinion on 01 November 1988, Eleventh Circuit Court of Appeals Case No. 87-3257.

A second motion for state post-conviction relief was filed, on or about 09 October 1989, by Mr. Summers pursuant to Fla. R. Crim. P. 3.850 in the First Judicial Circuit Court, Okaloosa County, Florida. The grounds raised were newly discovered evidence of fraud by former trial counsel and ineffective assistance of trial counsel. The state court denied the motion on 30 November 1990, and Mr. Summers appealed to the District Court of Appeals, First Appellate District of Florida. The state appellate court affirmed the circuit court's denial in an opinion dated 11 January 1991. *Summers v. State*,

573 So.2d 843 (Fla. 1st DCA 1991). Mr. Summers then filed his second federal habeas corpus motion, pursuant to 28 U.S.C. § 2254, on 05 February 1992. (R1-1).

An evidentiary hearing on the question of abuse of the writ was conducted on 23 September 1994. (R2-25). United States Magistrate Judge William C. Sherrill, who presided over the hearing, entered an order setting a briefing schedule and an evidentiary hearing for September of 1995. (R2-35). The state then filed a motion for reconsideration which Magistrate Judge Sherrill granted. (R2-37). In the motion for reconsideration, the state alleged that Mr. Summers' second habeas corpus motion was an abuse of the writ, which is a dispositive defense. Magistrate Judge Sherrill concluded that he could only enter a Report and Recommendation to a district court judge because only district court judges can consider dispositive defenses. (R2-40-2).

The report and recommendation was entered by Magistrate Judge Sherrill on 24 May 1995. (R2-40).

Magistrate Judge Sherrill recommended that state's motion for summary judgment be granted as to the actual innocence claim, but denied as to the abuse of the writ claim. Magistrate Judge Sherrill recommended that the case be referred for a full evidentiary hearing. (R2-40-26). On 10 July 1995, United States District Court Judge Lacey A. Collier entered an order which adopted the magistrate's report and recommendation as to the issue of Mr. Summers actual innocence, but rejected it as to the claim of abuse of the writ. (R2-45-2). Judge Collier entered a judgment in favor of the state, granting the Respondent's motion for summary judgment. (R2-46). Mr. Summers timely filed a notice of appeal of that order on 20 July 1995 (R2-47) to the Eleventh Circuit Court of Appeals.

After the record was certified and reviewed, it was discovered, through a review of transcripts of the state court evidentiary hearing on 13 January 1984, that United States District Court Judge Lacey Collier was formerly an assistant state attorney and was involved in the state court prosecution of

Mr. Summers. Specifically, the transcripts revealed that Judge Lacey Collier, as an assistant state attorney, was tendered as a rebuttal witness by the state to the testimony of Mrs. Dawn Summers, the Appellant's mother. (RE 51). Mrs. Summers was the key witness in the successor federal habeas hearing before Magistrate Judge Sherrill on the abuse of the writ issue. On 06 October 1995, Mr. Summers then moved, through undersigned counsel, for the Eleventh Circuit Court of Appeals to temporarily relinquish jurisdiction and to assign another district court judge to review the report and recommendation of the magistrate. The Clerk of the Court notified counsel that a Rule 60(b), Fed. R. Civ. P., type motion should first be filed in the district court. On 07 November 1995, Mr. Summers filed a Motion For Relief From Order pursuant to Rule 60(b), Fed. R. Civ. P. in the United States District Court, Northern District of Florida, Pensacola Division. Mr. Summers moved District Court Judge Collier to vacate the order he entered on 10 July 1995, which granted the state's motions for summary judgment

on the claims of actual innocence and ineffective assistance of counsel, and further requested that the district court allow another district court judge to consider the report and recommendation submitted by Magistrate Judge Sherrill. (1SR-56). The justification for the allegation was that Judge Collier's prior participation as an assistant state attorney disqualified him in the case as he was being tendered as a rebuttal witness to Mrs. Summers in the original state post-conviction proceeding on material issues of disputed fact as to abuse of the writ. Mrs. Summers was also a witness in the successor cause-prejudice hearing before Magistrate Judge Sherrill on 23 September 1994. Judge Collier entered an order on 21 November 1995 denying the 60(b) motion in which he stated that "this Court has no memory of the underlying case." (1SR-59). A timely notice of appeal was filed on 13 December 1995. (1SR-61).

On the same date, Mr. Summers filed a motion to consolidate two appeals in the Eleventh Circuit. The Eleventh Circuit entered an order granting the motion and consolidated

the appeal from the district court's original order of 10 July 1995 on the habeas proceeding with the appeal of district court's order of 21 November 1995, denying the Rule 60(b), Fed.R.Civ.P. motion.

Mr. Summers prosecuted his appeal to the United States Court of Appeal for the Eleventh Circuit which affirmed on 15 August 1997. *Summers v. Singletary*, 119 F.3d 917 (11th Cir. 1997). Petition for Rehearing was filed on 04 September 1997, and denied on 08 October 1997. (A-12-13).

The main issue addressed by the Eleventh Circuit on appeal was the timeliness (self executing nature) of a motion to disqualify under 28 U.S.C. §455(b). In declining to draw a distinction between 28 U.S.C. §455(a) and §455(b), the Eleventh Circuit joined the majority of the courts having addressed the issue and found a timeliness element under 28 U.S.C. §455(b). (A-9-10).

H. REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Eleventh Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. The Eleventh Circuit declined to note a distinction between §455(a) and (b) on timeliness. (A-9-10). The Eleventh Circuit "join[ed] the majority of courts that have decided the issue," (A-10) and rejected the minority position enunciated by the Seventh Circuit.

Mr. Summers argued 28 U.S.C. §455(b)(3) requires mandatory recusal[2] when the district judge "served in governmental employment and in such capacity participated as counsel...concerning the proceedings...in controversy." §455(b)(3). Thus, timeliness is not relevant when a judge is disqualified under one of the §455(b) categories; such a judge is not merely disqualifiable, but is *disqualified*. Recusal is

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[2] 28 U.S.C. §455(b): "He shall also disqualify himself in the following circumstances...."

automatic, and any orders previously entered by the judge are void, not merely voidable.

The purpose behind a §455(b) recusal is not simply to promote public confidence in the judiciary, but is necessary due to "genuine conflicts of interest or actual bias." *Id.*; *United States v. Alabama*, 823 F.2d 1532, 1541 (11th Cir. 1987). Due to Judge Collier's previous adversarial role in Mr. Summers' prosecution, he had an actual conflict of interest. Mr. Summers could not have waived this conflict if he had offered to. 28 U.S.C. §455(e); *United States v. Murphy*, 768 F.2d 1518, 1540 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986). However, under the Court's analysis, Mr. Summers in essence did waive the conflict of interest by not remembering Judge Collier's role in his case from 10 years earlier, even though Judge Collier had "no memory of the underlying case..." either. (1SR-59).

In a case where the defendant's lawyer has a conflict of interest, this Court has required any waiver by the defendant to

be clear, unequivocal, and unambiguous and "manifest on the face of the record." *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975); *see United States v. Petz*, 764 F.2d 1390 (11th Cir. 1985). Where a conflict of interest exists with the judge, there must be at least some evidence that the defendant appreciated the conflict and chose to ignore it to gain a tactical advantage or "hedge his bets" in case of a future unfavorable ruling. In the absence of any willful acquiescence to a conflict, a §455(b) motion for recusal should not be dismissed on grounds of "timeliness."

Whether 28 U.S.C. §455(b) is "self executing" and subject to a "timeliness" requirement is an important issue worthy of consideration by the Supreme Court of the United States. Whether 28 U.S.C. §455(b) is subject to a "harmless error" analysis, as defined by Eleventh Circuit (A-9) is an important issue of national significance because standards of "good faith" or "bad faith" on the part of the movant must be defined. Further if the statute is not self executing, and requires

an unwritten "timeliness" requirement, guidance to the lower courts as to the appropriate "timely" window is needed. If, as the Eleventh Circuit holds, 28 U.S.C. §455(b) is subject to a "harmless error" analysis, what differentiates a "harmful" error in the context of a federal judge who is disqualified as a matter of law? A burden of proof and a burden of persuasion must be addressed. The standard of proof should be defined.

The opinion of the Eleventh Circuit Court of Appeals raises more questions than it answers. Petitioner Summers merely asked that another district court judge be assigned to review the report and recommendation of the United States Magistrate. No new trial was needed. No evidentiary on the requested review was necessary. No tactical advantage inured to Petitioner. No prejudice was experienced by the opposing side. In fact had the requested relief been granted and another judge had been assigned, according to the Eleventh Circuit's opinion, the case would have been summarily affirmed (A-6), and there would actually a conservation of judicial resources.

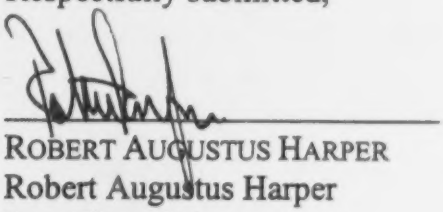
That the issue required appellate consideration, was a first impression in the circuit, and created a division among the circuits, is indicative of its importance. That the opinion of the Eleventh Circuit raises more questions than it answers on "timeliness," "harmless error," and "nonwaiver" [U.S.C. §455(c)] requires resolution by the Court.

Finally, the opinion of the Eleventh Circuit, even if correct, was not properly applied to Petitioner's case. On 07 November 1995, Mr. Summers filed a Motion for Relief From Order pursuant to Rule 60(b), Fed.R.Civ.P. At that filing, the Petitioner raised the issue under 28 U.S.C. §455(b) and suggested a judge, other than Judge Collier, should review not only the Report and Recommendation, but that another judge should be assigned to review the 60(b) motion. Even under the flawed analysis of the Eleventh Circuit as to timeliness of the request to review the Report and Recommendation, the motion to disqualify was clearly timely to require disqualification from review of the 60(b) motion.

I. CONCLUSION

The petition for writ of certiorari should be granted, and that relief is hereby requested.

Respectfully submitted,



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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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11 Fla. L. Weekly Fed. C 358
(Cite as: 119 F.3d 917)

David Michael SUMMERS, Petitioner-Appellant,
v.
Harry K. SINGLETARY, Jr., Respondent-Appellee.

Nos. 95-2952, 95-3696.

United States Court of Appeals,
Eleventh Circuit.

Aug. 15, 1997.

Robert A. Harper, Jr., Steven B. Whittington, Tallahassee, Florida, for Petitioner-Appellant.

Amelia L. Beisner, Asst. Atty. Gen., Tallahassee, Florida, for Respondent- Appellee.

Appeals from the United States District Court for the Northern District of Florida.

Before DUBINA and BLACK, Circuit Judges, and COHILL [FN*], Senior District Judge.

> FN* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

COHILL, Senior District Judge:

Appellant David Michael Summers ("Summers") appeals the denial of his motion for disqualification pursuant to 28 U.S.C. § 455(b), and the district court's grant of summary judgment for

the state in his petition for habeas corpus relief. For the reasons set forth below, we will affirm the district court on all issues.

I. BACKGROUND

A. Procedural History

Summers was charged in state court with armed burglary, kidnaping, sexual battery with a firearm, and aggravated assault. He pled guilty to sexual battery with a firearm, and a nolle prosequi was entered for the remaining counts of the indictment. On April 22, 1983, Summers was sentenced to two hundred years imprisonment, with jurisdiction retained by the state for a review of parole release for a period of one hundred years.

Summers appealed his conviction to the District Court of Appeal, First Appellate District of Florida. He also filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, which raised an ineffective assistance claim against his counsel. The motion was denied. Appeal was consolidated with the direct appeal of judgment and conviction. The District Court of Appeals affirmed on December 19, 1984. Summers v. State, 463 So.2d 311 (Fla.Dist.Ct.App.1984). The Supreme Court of Florida denied review. Summers v. State, 475 So.2d 696 (Fla.1985).

Summers filed his first federal habeas corpus petition under 28 U.S.C. § 2254 on April 30, 1986, alleging ineffective assistance of counsel. The district court denied his petition and this court affirmed by unpublished opinion on November 1, 1988.

Summers subsequently filed a second petition for post-conviction relief in state court, alleging ineffective assistance and newly discovered evidence. The circuit court denied the motion and the District Court of Appeals affirmed. Summers v. State, 573 So.2d 843 (Fla.Dist.Ct.App.1991).

On February 5, 1992, Summers filed his second federal habeas corpus petition. The motion was referred to Magistrate Judge William Sherrill, who conducted a hearing on whether the second petition constituted abuse of the writ. Following that hearing, Magistrate Judge Sherrill entered a report and recommendation to United States District Court Judge Lacey Collier, recommending that the court grant the state's motion for summary judgment on Summers' actual innocence claim, but deny the motion on abuse of the writ. The magistrate judge found that Summers met the cause and prejudice standard necessary to overcome the abuse of the writ defense, and he recommended that the case be remanded for a full evidentiary hearing on the merits of Summers' claim.

On July 10, 1995, Judge Collier entered an order adopting the report and recommendation as to the issue of actual innocence, but rejecting the report as to the abuse of the writ claim. Judge Collier's order granted summary judgment for the state. Summers then perfected his appeal.

After the record was certified and reviewed, Summers' counsel discovered that Judge Collier had been an assistant state attorney involved in the hearing on Summers' first petition for post-conviction relief. On October 6, 1994, four months after Judge Collier issued his order denying habeas corpus relief, Summers moved for the court to temporarily relinquish jurisdiction and for another district judge to be assigned to review the report and recommendation.

The Clerk of Court notified Summers' attorney that a motion should first be filed pursuant to Fed.R.Civ.P. 60(b) and Summers filed a Motion for Relief from Order under Rule 60(b) on November 7, 1995. Summers moved the district court to vacate the July 10, 1995 order which granted the state's motion for summary judgment and to allow another district judge to consider the report and recommendation. On November 21,

1995 Judge Collier denied the motion. Summers filed a timely notice of appeal of this order on December 13, 1995.

On that same date, he filed a motion to consolidate the appeal from the district court's original order granting summary judgment for the state on Summers' habeas corpus petition, with the appeal of the district court's order of November 21, 1995, denying the Rule 60(b) motion. That motion was granted.

We have jurisdiction over an appeal from a final order in a federal habeas corpus case under 28 U.S.C. § 2253. [FN1] We have jurisdiction over a final order from a district court under 28 U.S.C. § 1291.

> FN1. At oral argument, counsel questioned our jurisdiction in the absence of a Certificate of Probable Cause for No. 3696 as required by 28 U.S.C. § 2253. We are confident of our jurisdiction to decide the issues presented in both appeals. The district court issued a Certificate of Probable Cause for No. 95-2952, and Summers filed a motion to consolidate both petitions for appeal. When this Court granted Summers' motion to consolidate both appeals, it recognized the existence of probable cause in his second appeal.

B. Factual History

The factual background to petitioner's motion to disqualify under 455(b) is as follows: Summers appealed Judge Collier's grant of summary judgment on his second federal habeas corpus petition. After the record was certified for appeal, Robert A. Harper, Jr., Summers' counsel, discovered while reviewing transcripts of the evidentiary hearing on Summers' first state court habeas proceeding that Judge Collier had been an assistant state attorney involved in that hearing.

The assistant state attorney representing Florida at that hearing was Albert H. Grinsted. He sought to introduce the testimony of Mr. Lacey Collier, another assistant state attorney, for the purpose of impeaching the testimony of petitioner's mother, Dawn Summers. Grinsted proffered that Collier would testify that Mrs. Summers had the opportunity to talk to an official about improprieties in her son's case, but did not at that time. Mr. Harper was petitioner's attorney in that proceeding. Harper argued that this would be, at best, a collateral issue, and the court agreed.

> COURT: Does the Court understand that it's not your contention that she did, in fact talk to someone else and get that information, but merely that she had the opportunity to do so?
>
> GRINSTED: Yes, sir, she had the opportunity to do it and did not.
>
> COURT: I won't allow it in, counselor, it's immaterial.

(R1-56-353-54).

After realizing that assistant state attorney Collier was now the district judge who had granted summary judgment for the state on his client's second federal habeas petition, Harper filed a motion to disqualify the judge under 28 U.S.C. § 455(b). Judge Collier denied the motion, stating that "this Court has no memory of the underlying case."

II. ISSUES PRESENTED

Summers raises several issues on appeal relating to his petition for habeas corpus relief and the denial of his Rule 60(b) motion. Only one issue merits our discussion: whether the district court properly denied Summers' Rule 60(b) motion to disqualify Judge Collier pursuant to 28 U.S.C. § 455(b).

We summarily affirm the district court on all other issues raised by Summers in both appeals. See Eleventh Circuit Rule 36-1.

III. STANDARD OF REVIEW

Whether a motion to disqualify under 28 U.S.C. § 455(b) must be timely filed is an issue of first impression in this Circuit. Thus, it is a question of law and is reviewed de novo. Dominguez v. Tom James Co., 113 F.3d 1188 (11th Cir.1997).

IV. DISCUSSION

Summers' motion to disqualify pursuant to Fed.R.Civ.P. 60(b), contends that Judge Collier should disqualify himself under 28 U.S.C. § 455(b)(3), because the judge was a material witness for the state in Summers' initial Rule 3.850 proceeding and because the judge participated as an assistant state attorney in that proceeding.

Section 455 provides, in pertinent part, that a judge should disqualify himself under certain circumstances:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy[.]

28 U.S.C. § 455(a), (b)(3).

As a threshold issue on this appeal, we must determine whether § 455(b) includes a requirement that a motion to disqualify must be timely filed. This is an issue of first impression for this Court. Summers argues that § 455(b) sets forth a per se rule for disqualification, and that timeliness can have no effect on a rule where the Judge has no discretion but must recuse himself. The state urges us to find a timeliness requirement in § 455(b), and

further argues that under such a requirement Summers' motion was not timely.

Although no explicit timeliness requirement is stated in the language of § 455, the jurisprudence of this circuit has previously recognized that a motion to disqualify a judge or magistrate under § 455(a) must be timely filed. United States v. Slay, 714 F.2d 1093, 1094 (11th Cir.1983), citing Delesdernier v. Porterie, 666 F.2d 116, 121-23 & n. 3 (5th Cir.), cert. denied, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982).

We have, however, also noted important differences between the two sections. Section 455(a) addresses the appearance of impropriety, and may be waived by the parties after full disclosure. Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir.1988), cert. denied, 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989). Its purpose is to promote public confidence in the judiciary. Liljeberg v. Health Services Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Conversely, § 455(b) establishes a per se rule that lists certain circumstances requiring recusal. Id., citing United States v. Alabama, 828 F.2d 1532, 1541 (11th Cir.1987). Section 455(b) and its subparts apply to genuine conflicts of interest or actual bias. Where these circumstances exist, disqualification may not be waived. Id.

In Slay, this Court previously suggested that § 455(b) might include a timeliness requirement. In that case, the defendant moved to disqualify the magistrate judge under both § 455(a) and (b)(1) following an adverse decision at a suppression hearing. This Court held that timeliness was a component of § 455(a), and that defendant's motion was untimely because counsel was aware of the facts which allegedly supported his motion to disqualify before the hearing. Id. at 1094. This Court did not reach the timeliness issue on defendant's § 455(b)(1) claim, because it found no evidence that the magistrate had

based his decision on any extrajudicial information or on any personal bias or prejudice. Id. at 1095.

This Court again skirted timeliness with regard to § 455(b) in United States v. State of Alabama, 828 F.2d 1532 (11th Cir.1987). In that case, Alabama challenged the propriety of an African-American judge to hear an action seeking to end segregation in the state system of higher education. The motion to disqualify addressed, inter alia, the judge's early involvement as a state senator and private attorney with the same evidentiary facts now being disputed in his courtroom. The court noted that Slay treated claims brought under § 455(a) and (b)(1) differently, but declined to determine whether timeliness was required by § 455(b). Id. at 1544 n. 49. In granting the motion to disqualify under (b)(1), for personal knowledge of disputed evidentiary facts, the court suggested that timeliness might be applied to § 455(b), but that even if it did apply the motion had been timely filed. Id. The court reasoned that the motion to disqualify had been filed at the earliest possible opportunity, and that there was no purpose to delay or speculate on a favorable judgment. Id.

The facts of this case place the timeliness question squarely before us, and we now hold that timeliness is a component of § 455(b). Although the substantive differences between the two sections are clear, procedurally we see no reason to distinguish between them. We thus follow the approach set out in Parker, where it was held that the harmless error analysis which the United States Supreme Court applied to violations of § 455(a) in Liljeberg v. Health Services Corp. should apply to § 455(b) as well, despite the differences between the two sections. Parker, 855 F.2d at 1527-28; Liljeberg, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Accord, Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1420 (Fed.Cir.1989). The policy considerations supporting a timeliness requirement are the same in each section: to conserve judicial resources and

prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge.

We find the reasoning of United States v. York, 888 F.2d 1050 (5th Cir.1989), persuasive in this regard:

> A timeliness requirement under section 455(b) serves to protect against the same ploys as under section 455(a). However, the gains in judicial economy from a timeliness requirement are greater than those from permitting waiver ... a timeliness requirement will proscribe motions that would have invalidated a fully completed trial.
>
> Moreover, a timeliness requirement has an additional dimension: Prohibiting waiver may cost time and effort, but it is neutral with respect to the expected outcome of the case, as any waiver that would have occurred but for the prohibition would have been one to which both parties had agreed. Lack of a timeliness requirement, though, would allow the losing party an increased chance of a new trial. Thus, policy reasons supporting a timeliness requirement appear to be stronger than those supporting a waiver option. Hence, we conclude that it is more consistent with the legislative purposes underlying the entirety of section 455 for us to construe both subsections (a) and (b) as requiring timeliness.

York, 888 F.2d at 1055.

In declining to draw a distinction between § 455(a) and (b) on timeliness, we join the majority of courts that have decided the issue. See, e.g., E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 (9th Cir.1992); United States v. Owens, 902 F.2d 1154, 1155-56 (4th Cir.1990); Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1414 (8th Cir.1983); Willner v. University of Kansas, 848 F.2d 1023, 1029 (10th Cir.1988); Apple v. Jewish Hospital and Medical Center, 829 F.2d 326, 334 (2d Cir.1987). Conversely, the Court of Appeals for the Seventh Circuit has held that there is no timeliness requirement for motions to disqualify. United States v.

Murphy, 768 F.2d 1518, 1539 (7th Cir.1985). However, that rule has subsequently been questioned. See Schurz Communications, Inc. v. F.C.C., 982 F.2d 1057, 1060 (7th Cir.1992) (denying a motion to disqualify under § 455(a) and (b) as being untimely).

Having determined that a motion filed under § 455(b) must be timely filed, we must now consider whether Summers' motion to disqualify Judge Collier meets that standard. We find that it does not. Other jurisdictions have declined to adopt a per se rule on timeliness, and neither will we. See, e.g., Preston v. United States, 923 F.2d 731, 733 (9th Cir.1991) (filing required with reasonable promptness after the grounds are ascertained); York, 888 F.2d at 1056 (finding untimeliness where defendant was generally aware of the circumstances upon which his motion was based before trial, but did not move to disqualify until after trial); Apple v. Jewish Hospital and Medical Center, 829 F.2d 326, 333 (2d Cir.1987) (holding motion to disqualify was untimely and must be made at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim). We hold that a motion to disqualify filed under § 455(b) must be filed within a reasonable time after the grounds for the motion are ascertained. Certainly, where the facts are known before a legal proceeding is held, waiting to file such a motion until the court has ruled against a party is untimely. Both Summers and his counsel were present when the circumstances underlying petitioner's motion arose. They did not raise the issue until after an adverse decision on the magistrate judge's report and recommendation had been entered. This was too late.

V. CONCLUSION

We hold that 28 U.S.C. § 455(b) contains a timeliness requirement, and that Petitioner's motion was not timely filed. The decision of the district court is AFFIRMED.

Filed
U.S. Court of Appeals
Eleventh Circuit
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-2952 & 95-3696

DAVID MICHAEL SUMMERS,
Petitioner-Appellant,

versus

HARRY K. SINGLETARY, JR.,
Respondent-Appellee.

On Appeals from the United States District Court for the
Northern District of Florida

BEFORE: DUBINA and BLACK, Circuit Judges, and COHILL*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, David Michael Summers, is Denied.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
United States Circuit Judge

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* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.